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SUPREME COURT, U.S.

No. 99-416
In the Supreme Court of the United States

ERIC RURAL HANNA,

Petitioner,

v.

MICHIGAN,

Respondent.

On Petition for Writ of Certiorari
to the Michigan Supreme Court

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

DOES THE FOURTH AMENDMENT PROHIBIT THE POLICE FROM USING PAIN COMPLIANCE TECHNIQUES WHICH HAVE THE EFFECT OF SUBDUING AN ARRESTEE TO FACILITATE THE SAFE AND EFFECTIVE EXECUTION OF A SEARCH WARRANT TO EXTRACT A BLOOD SAMPLE, WHERE SUCH PAIN COMPLIANCE TECHNIQUES ARE REASONABLE IN NATURE?

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STATEMENT OF THE CASE

Respondent generally accepts the petitioner's statement of the case, but only with the following additions and corrections necessary to make it accurate and complete.

At the hospital, the petitioner in a loud and angry voice repeatedly proclaimed that he would not permit anyone to draw his blood. The petitioner even refused to lie on the examination table. When the laboratory technician attempted to draw petitioner's blood, the petitioner jerked his arm away. The police officers who were attempting to execute the search warrant for petitioner's blood sample used a pain compliance device called "Do-Rite sticks" to restrain petitioner and to have him hold still while the laboratory technician drew his blood. One of the police officers testified that handcuffs and bed restraints would not be effective in preventing petitioner's movement during the drawing of his blood. The petition is not correct when it states, p. 2, that "the devices are not used as restraints. . . ."

The Michigan Court of Appeals held that the "police acted reasonably in briefly using Do-Rite sticks to subdue petitioner and ensure the safe execution of the warrant," *People v. Hanna*, 223 Mich. App. 466, 472-473; Petitioner's appendix p. 13, and that "the laboratory technician testified that defendant showed no signs of pain whatsoever." 223 Mich. App. 474; Petitioner's appendix p. 18.

The Michigan Court of Appeals determined that the police did not use the Do-Rite sticks simply to punish the petitioner but rather "to subdue and protect the safety of the combative defendant." 223 Mich. App. 474; Petitioner's appendix, p. 18. The Michigan Court of Appeals also mentioned that "it is doubtful whether the force exerted in physically overpowering, positioning, and holding the combative defendant would have been less violent or caused less pain than the quick application of the Do-Rite sticks." 223 Mich. App. 473; Petitioner's appendix, p. 17.

ARGUMENT

THE FOURTH AMENDMENT DOES NOT PROHIBIT THE POLICE FROM USING PAIN COMPLIANCE TECHNIQUES WHICH HAVE THE EFFECT OF SUBDUING AN ARRESTEE TO FACILITATE THE SAFE AND EFFECTIVE EXECUTION OF A SEARCH WARRANT TO EXTRACT A BLOOD SAMPLE FROM THE SUSPECT, WHERE SUCH PAIN COMPLIANCE TECHNIQUES ARE REASONABLE IN NATURE.

The petitioner presents his case as consisting of "two important open questions concerning the Fourth Amendment Reasonableness Clause." (Petition, p. 5.) One is a "narrower question," which petitioner states as "whether it is reasonable for the police to inflict pain in order to obtain blood from a drunk driving arrestee who objects, for religious or health reasons, to the blood draw procedure." (Petition, p. 5.) This statement of the question is not accurate for the case at hand because it omits any qualifying language that inflicting pain was not objectively reasonable. The proper standard to judge whether the police used excessive force in the course of a Fourth Amendment seizure is whether the officer's actions are "objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation," and without 20/20 hindsight. *Graham v. Connor*, 490 U.S. 386, 396, 397; 109 S. Ct. 1865; 104 L. Ed. 2d 443, 455, 456 (1989). Moreover, the question as stated by petitioner fails to account for the fact that the "pain" inflicted by the police was in direct response to the petitioner's combativeness in preventing the laboratory technician from executing the search warrant to draw petitioner's blood, and was used to prevent harm to the technician, the officers themselves, and to the petitioner.

The other question--the so-called "broader" question--is stated by petitioner as "when, if ever, may the police intentionally inflict pain to force a person to comply with an otherwise lawful Fourth Amendment seizure." (Petition, p. 5.)

The petitioner contends that the pain inflicted by the police officers in the instant case was not a necessary incident to constitutional Fourth Amendment activity, but was "deliberately inflicted to coerce a person into complying with the police," and is thus akin to "torture." (Petition, p. 5.) This statement of the question by the petitioner is not accurate because the police, as the Michigan Court of Appeals and Michigan Supreme Court determined, used the pain compliance device to restrain or subdue the petitioner "to facilitate the safe and effective execution of the warrant," and not to punish or torture the petitioner. (223 Mich. App. 473, 474; Petitioner's appendix, p. 17, 18; 459 Mich. 998; Petitioner's appendix, p. 3.)

A. The Fourth Amendment Does Not Prohibit the Police from Using Force or Inflicting Pain to Subdue or Restrain a Drunk Driver's Physical Resistance to a Drawing of Blood Pursuant to a Search Warrant, in Order to Prevent Injury to the Technician Drawing the Blood, the Officers, and to the Arrestee so Long as the Force Used is Objectively Reasonable in Light of the Facts and Circumstances Confronting the Officers.

The petitioner erroneously reads this Court's decisions in *Schmerber v. California*, 384 U.S. 757; 86 S. Ct. 1826; 16 L. Ed. 2d 908 (1966)and *South Dakota v. Neville*, 459 US 553; 103 S. Ct. 916; 74 L. Ed. 2d 748 (1983) as recognizing that "a compelled blood test may be unreasonable if the police resort to violence or inflict pain in order to obtain the blood sample." (Petition, p. 6.) These two cases do not stand for the proposition attributed to them by petitioner. Rather, as petitioner seems to recognize in his next paragraph, *Schmerber* noted, and *Neville* acknowledged, that "[i]t would be a different case if the police *initiated* the violence. . .or *responded* to the resistance with *inappropriate* force." 384 U.S. 760 n 4; 16 L Ed 2d, 913; 459 U.S. 559 n 9; 74 L. Ed. 2d 756 (Emphasis added). Thus, the petitioner's major premise that resort to violence or infliction of pain to obtain a blood sample is forbidden by the Fourth Amendment is not supported by the very cases he cites in support of that premise. The force or violence used by the police must always be measured under a

test of objective reasonableness in light of the facts and circumstances confronting the officers, without resort to 20/20 hindsight. *Graham v. Connor, supra.*

The police officers in the instant case were confronted with a suspect who had declined to take a breath test, and who declared to them after a search warrant was obtained to draw his blood, that no one would take his blood. The petitioner refused to cooperate with the laboratory technician who was to draw his blood, was combative with attempts to lie still while the blood was drawn, and jerked his arm away from the technician upon an attempt to draw the blood. The Michigan Court of Appeals noted that the technician was not able to "have safely drawn the defendant's blood unless defendant ceased his combative conduct." 223 Mich.. App. 473; Petitioner's appendix, p. 17.

The police officers had a choice between using physical force to hold petitioner down during the blood draw or using a pain compliance measure (Do-Rite sticks) to subdue petitioner's physical resistance. The choice of using physical force to hold a suspect down comes with a heavy price, however, as such a procedure would have put them, the technician and the petitioner at danger of being pierced by the needle if petitioner continued to resist. The officers and the technician would thus be at risk for contracting HIV/AIDS if petitioner had harbored the virus, which at the time was an unknown factor.

The officers testified that the more effective way to overcome the petitioner's physical resistance was to use the Do-Rite sticks, which the Michigan Court of Appeals acknowledged would have been less violent and cause less pain than attempting to physically overpowering, positioning and holding down the petitioner. 223 Mich. App. 473; Petitioner's appendix, p. 17. Either option was to effect the same result: namely to stop the petitioner's physical resistance to a lawful order to draw his blood safely. Merely because the police chose the safest and most effective method, which also caused less pain and violence than the other option, does not render its use inconsistent with the Fourth Amendment.

The petitioner attempts to distinguish *Schmerber* from the instant case on the basis "that Schmerber did not pose a sincere objection to the blood draw and that no significant pain was involved." (Petition, pp. 6-7.) Respondent submits that the reference to "pain" in *Schmerber* is referring to the pain of the blood test/draw itself, and the Court there concluded that where the test is performed by medical personnel, "for most people the procedure involves virtually no risk, trauma, or pain." 384 U.S. 771; 16 L. Ed. 2d 920.

The petitioner also relies upon language in *Schmerber* which states "[p]etitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the 'breathalyzer' test petitioner refused." 384 U.S. 771; 16 L. Ed. 2d 920. Petitioner then concludes that once a suspect makes known such health concern, the police must respect such wishes, and not conduct the test which the suspect finds objectionable on the basis of fear, health or religious scruple.

The petitioner in the instant case does not fit within the language just cited. Although he expressed a concern of contracting AIDS from the needle, he did not prefer some other test, and had previously refused to take a breathalyzer test. His objection to the blood draw in the instant should not be viewed as a "sincere" objection, as the risk of contracting AIDS is virtually nonexistent, since the blood was drawn by a trained lab technician using a new, sterile needle. As the technician testified, transcript p. 109:

> When I told him I was going to draw his blood he said, you know, that he was afraid of getting AIDS from the needle. I told him every needle was just a brand new needle, sealed, you have to break the seal to use it once and that is it. It is disposed of. He didn't like that answer either.

On the other hand, the risk of AIDS/HIV is very real to the technician drawing blood from a suspect, and to the police officers who must restrain a resisting suspect, because of the risk of puncture by the needle which has come into contact

with the suspect's blood. Moreover, the police obtained a search warrant to draw petitioner's blood and were executing a valid court order at the time, a factor not present in *Schmerber*.

The petitioner further concludes that the instant case "is, therefore, the 'different case' of which this Court spoke in *Schmerber*, where the 'police initiated the violence' and 'responded to resistance with inappropriate force.'" (Petition, p. 8.) Respondent submits that it was petitioner himself who initiated the violence when he declared that no one would draw his blood, and physically resisted the technician's attempt to obtain a blood sample. At that point, the technician was not able to safely draw the petitioner's blood unless the police were to restrain him. The police chose to restrain petitioner by use of the Do-Rite sticks and the Michigan Supreme Court concluded that their use by the officers was objectively reasonable in this case ("Moreover, the officers used the Do-Rite sticks for only a few seconds and defendant was not injured. In light of the circumstances, the officers' limited and measured use of the Do-Rite sticks in this case satisfied the objective reasonableness test set forth in *Graham* and *Forrester [v. City of San Diego*, 25 F.3d 804 (9th Cir., 1994)])"459 Mich. 998; Petitioner's appendix, p. 3.

The petitioner cites *Nelson v. City of Irvine*, 143 F.3d 1196 (CA 9, 1998), and reads this decision much too broadly in support of a holding that is simply not present in that case. (See, Petition, p. 8.) Unlike the instant case, in which the blood test was conducted pursuant to a search warrant, the officers in *Nelson* did not obtain warrants to administer the blood tests. Therefore, the issue in *Nelson* was "whether the blood tests were reasonable, and whether 'exigent circumstances' or some other exception to the warrant requirement existed to excuse the police from obtaining warrants." *Nelson* at 1200. The actual holding in *Nelson* is that requiring a suspect to take a warrantless blood alcohol test when the suspect had requested an alternative test (i.e., breath, urine), violates the Fourth Amendment.

The *Nelson* opinion simply did not hold, as petitioner suggests, "that the police may not inflict pain or use force to

extract blood from a suspected drunk driver unless there is no other way of establishing intoxication." (Petition, p. 8.) The Ninth Circuit in *Hammer v. Gross*, 932 F.2d 842, 845 (9th Cir. 1991) had previously held that "*Schmerber* does not preclude the use of force in some circumstances to extract a blood sample from a resistant suspect." *Nelson* did not overrule the holding in *Hammer*.

The petitioner suggests that the police had other means to prove intoxication without having to resort to restraining defendant with the Do-Rite sticks to draw his blood, namely, to offer him an alternative chemical test after he refused to cooperate with having his blood drawn. (Petition, p. 8.) But the petitioner had earlier refused to take a breath test, and the police by then had obtained a search warrant to authorize the drawing of petitioner's blood. At some point, the offer for an alternative test must end because of the danger of the destruction of evidence due to the percentage of alcohol leaving the blood after drinking has stopped. See *Schmerber*, 384 U.S. 770-771; 16 L. Ed. 2d 920. In any event, the Fourth Amendment does not require the police to advise suspects of their right to choose alternatives to a blood test. *Nelson, supra* at 1203.

B. The Fourth Amendment Does Not Prohibit Police from Using Pain Compliance Devices to Overcome an Arrestee's Physical Resistance to a Fourth Amendment Seizure.

The Respondent does agree with petitioner on one point: The Fourth Amendment does not permit the police to "torture" citizens to make them comply with a Fourth Amendment seizure. The petitioner attempts to paint the use of the Do-Rite sticks in the instant case as merely a form of torture. The Michigan Court of Appeals directly addressed the issue when it held that the use of Do-Rite sticks in the instant case were not used to punish the petitioner but rather to subdue his physical resistance to the execution of the search warrant. 223 Mich. App. 474; Petitioner's appendix, p. 18. The trial court judge also determined that the police used the Do-Rite sticks "in a reasonable fashion, to subdue Mr. Hanna in order for them to obtain the blood." (Motion for New Trial, August 7,

1995, p 28; Petitioner's appendix, p. 29.)

Both the Michigan Court of Appeals and Supreme Court determined that the use of the Do-Rite sticks in the instant case was objectively reasonable in light of the circumstances of the case. The Michigan Supreme Court held the following on reconsideration of their order denying leave to appeal:

> On reconsideration of the Supreme Court's order of June 30, 1998, 458 Mich 862, leave to appeal is denied because the Court of Appeals properly applied the "objective reasonableness" test set forth in *Graham v Connor*, 490 US 386 (1989), and *Forrester v San Diego*, 25 F3d 804 (CA 9, 1994). The officers used a reasonable amount of force in light of the surrounding facts and circumstances. Reported below: 223 Mich App 466.

This conclusion is well supported by the Court of Appeals reasoning:

> [T]he laboratory technician testified that he could not have safely drawn defendant's blood unless defendant ceased his combative conduct. Indeed, were he not pacified, defendant could have injured himself or others by causing the needle to inadvertently lacerate or break. With the obvious harm inherent by [sic] a misdirected or broken needle, the police were legitimately concerned about subduing defendant in order to facilitate the safe and effective execution of the warrant. Otherwise defendant could have caused injury and thwarted the execution of the warrant. [223 Mich App 473.]

Moreover, the officers used the Do-Rite sticks for only a few seconds and defendant was not injured. In light of the circumstances,

> the officers' limited and measured use of the Do-Rite sticks in this case satisfied the objective reasonableness test set forth in *Graham* and *Forrester.*
>
> 459 Mich. at 998.

Petitioner claims that "[t]he Do-Rite sticks were thus not used as restraining devices to keep Petitioner in place during the blood draw. They were used solely as instruments of pain." (Petition, p. 11.) Petitioner also states elsewhere that "[t]here is no dispute from the record that the 'Do-Rite' sticks were used solely to coerce Petitioner into ending his refusal to cooperate." (Petition, p. 9.) The fallacy of petitioner's theory is that it fails to recognize that the police officers used the Do-Rite sticks not merely because defendant stated he would not allow the blood test, but because he was physically resisting the technician's attempts to draw his blood. His physical resistance endangered the technician who testified that due to Petitioner's physical resistance, he could not safely continue with the blood draw.

Officer Bradley LaCross testified that other restraining devices such as handcuffs and leather straps would not have been as effective in retraining the petitioner as the Do-Rite sticks because those other devices will still leave room for the subject to maneuver and thus cause injury to the subject and the technician. (Jury Trial Transcript, Vol. I, December 12, 1994, pp. 48-49:

> Q If that particular restraint device was not available what other devices would have been or could have been applied.
>
> A Handcuffs or the hospital does have like leather restraints that are almost handcuffs that attach to the side of the bed.
>
> Q Was there any particular reason why the do right devices are used as opposed to cuffing somebody?

A With the do right sticks we are able to control the subject physically more. When handcuffing somebody there still is room for play or room for movement which could cause injury.

Q Injury to whom?

A Either the subject getting the blood drawn or the lab technician.

Q As far as the use of the handcuffs, can injury occur through the use of the cuffs as a device?

A Yes, if there is a great amount of struggling you can hurt the wrists as well, actually hurt the wrists more, probably than a properly used do right.

Q If you had not had the do right devices at this time, Officer, would you have been able to get the blood?

A No.

The Michigan Court of Appeals also noted that "it is doubtful whether the force exerted in physically overpowering, positioning, and holding the combative defendant would have been less violent or caused less pain than the quick application of the Do-Rite sticks." 223 Mich. App. 473; Petitioner's appendix, p. 17.

The upshot is that the "pain" inflicted by the Do-Rite sticks substituted for the other forms of physical restraints available but which ultimately would not have been as effective in restraining defendant and protecting the technician, the officers, and the petitioner from injury during a physical struggle to administer the blood test. The Do-Rite sticks were effective in restraining the Petitioner and the officers promptly removed the restraints when resistance ended, thus permitting the technician to draw the blood.

The use of devices like the Do-Rite sticks has been upheld in a civil suit for damages based on a theory of excessive force under the Fourth Amendment. In *Forrester v. City of San Diego*, 25 F.3d 804 (9th Cir., 1994) 459 Mich. 998, the Ninth Circuit held that "[p]olice officers are not required to use the least intrusive degree of force possible. . . . Whether officers hypothetically could have used less painful, less injurious, or more effective force in executing an arrest is simply not the issue." *Forrester* at 807-808. In *Forrester*, the police used nonchakus (i.e., same as Do-Rite sticks) on the wrists of anti-abortion demonstrators, who blocked an abortion clinic, until they stood up and walked away on their own, in lieu of physically dragging and carrying them away.

The petitioner also suggests that if use of the Do-Rite sticks here is held to be reasonable, then "it should also be reasonable for the police to apply electric shocks to the genitals of a recalcitrant drunk driving suspect" or "to hold such a person's head underwater until he 'complies.'" (Petition, p. 12.) Such measures as these are extraordinarily intrusive of one's privacy, or can cause death, and are clearly impermissible methods of "torture." They bear no relation to the necessary, minimal and controlled force used by the police officers in the instant case, which had the effect of minimizing the injuries to the petitioner, the technician, and the officers. See *Forrester* at 808 n 5.

The issue in this case is whether the use of Do-Rite sticks was objectively reasonable in light of the facts and circumstances confronting the officers, judging from the perspective of the officers rather than with 20/20 hindsight. *Graham v. Connor, supra.* Respondent submits that they were.

The Michigan decision in this case is not in conflict with any decisions of other state courts of last resort, any United States Courts of Appeal or this Court. Nor does this case involve any important unsettled questions of federal law.

CONCLUSION

Therefore, respondent respectfully requests that this Court deny this petition for a writ of certiorari.

Respectfully submitted,

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